United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

w/affidavit

75-6129

To be argued by
RICHARD J. MCCARTHY

United States Court of Appeals

B
P/S

FOR THE SECOND CIRCUIT

Docket No. 75-6129

RONALD H. WHELAN, JOHN J. BRODERICK, EDWARD J. BURNS, EDWARD J. GASPARTICH, WILLIAM F. LYNCH, ANTHONY J. ROSS, HENRY O. HANRAHAN, RICHARD LIETO, FRANCIS B. McCOMB, FRANK B. JONES, BENEDETTO RUNCO, GEORGE S. BRITO, JOHN E. CONDON, JOHN E. HARKINS, JOHN B. JONES, WILLIAM F. KEHOE, RICHARD D. LANG, TIMOTEO MONGE, WALTER R. PRICE, ALFRED J. SEEVERS, GUNNAR O. STRAND, JOHN A. MUELLER, MARC LANG, BENEDETTO LEO, HARATIO N. AGGARD, JOHN S. FORTE, ERICH GEHM, JOSEPH G. GLENNON, CONSTANTINO L. LEONE, SABATO A. MESSINA, FRANK J. MONDELLO, HENRY G. NIELSEN, HAROLD M. OLIVER, SIMON R. ROSENTHAL, JOSEPH J. SCHULTZ, JOHN R. SHARPE, THOMAS SOLOMETO, JR., ANTONIO SPINELLI, MARIO RUNCO, FREDERICK H. MALLETT, ROBERT M. DE GARLAND, HENRY BUTLER, HERMAN SEIBEL, JAMES MULVANEY, and RICHARD DARE,
Plaintiffs-Appellants,

—against—

CHARLES S. BRINEGAR, Secretary of the Department of Transportation, ADMIRAL CHESTER R. BENDER, Commandant of the U.S. Coast Guard, and ROBERT E. HAMPTON, JAYNE SPAIN and L. J. ANDOLSEK, constituting the members of the U.S. Civil Service Commission,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

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Plaintiffs-Appellants,

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Defendants-Appellees.

BRIEF FOR APPELLEES

Preliminary Statement

Plaintiffs appeal from a Judgment, entered November 6, 1975, denying their claims for relief and dismissing the complaint. App. 210a, 3a. The case was tried without a jury to the Honorable Charles M. Metzner, United States District Judge for the Southern District of New

York. The District Court's findings of fact and conclusions of law are contained in an Opinion dated November 3, 1975. The Opinion is reprinted in the Joint Appendix at App. 203a to App. 209a.

Issues Presented

1) Do federal employees have a substantive right to back pay in a case arising under 5 U.S.C.A. § 5348(a) (Supp. 1976)?

2) Should the use of a wage survey method by the Department of Transportation for fixing and adjusting the Governor's Island ferryboat workers rates of pay comply with the publication or rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. §§ 552, 553?

3) Have plaintiffs demonstrated that the Department of Transportation was so arbitrary as to be clearly wrong in fixing and adjusting plaintiffs' rates of pay?

4) Does this Court have jurisdiction over an appeal from a Judgment that there was substantial evidence to support the United States Civil Service Commission's denial of an exemption from wage increase guidelines pursuant to authority granted by Executive Order No. 11639 under the Economic Stabilization Act of 1970, 84 Stat. 799, *as amended*, 12 U.S.C. § 1904 (Supp 1976)?

5) Are the 1972 and 1973 United States Civil Service Commission decisions denying the Department of Transportation's requests for exemption from the 5.5% wage increase guidelines based upon findings supported by substantial evidence?

Statement of the Case

Nature of the case and proceedings below:

Plaintiffs, officers and crew of the Governors Island Ferry (hereinafter referred to as "Governors Island ferryboat workers"), commenced this action on June 26, 1973. App. 2a, 4a. The Complaint alleges that the United States Coast Guard has not increased the rates of pay of the ferryboat workers as required by 5 U.S.C.A. § 5348 and by the prior policy of the United States Coast Guard, and demands judgment for each of the Governors Island ferryboat workers "for the prevailing and going rate of wages for the comparable jobs in the New York City Staten Island Ferry retroactive to July 1, 1967 and for a pay adjustment for the future together with appropriate interest, costs and disbursements as well as a reasonable attorney's fees." App. 11a. In essence, the plaintiffs want "parity" with their brethern who are employed on the Staten Island Ferry, the necessary result being that their pay would ebb and flow with the vagaries of New York City's financial condition and the City's bargaining position with the union representing the Staten Island Ferry employees.

The defendants, all officers or agencies of the United States (collectively referred to herein as the "Government"), filed an Answer requesting dismissal of the Complaint and raising three affirmative defenses: 1) lack of subject matter jurisdiction; 2) failure to state a claim upon which relief may be granted; and 3) failure to exhaust administrative remedies. App. 2a, 14a-17a. After filing two Stipulations clarifying the parties (App. 2a, 337a-338a), the Governors Island ferryboat workers moved pursuant to Rule 12 of the Federal Rules of Civil Procedure for dismissal of all three affirmative defenses. The Government opposed this motion, and filed a Motion

for Summary Judgment which the ferryboat workers opposed. App. 2a.

The Court below granted plaintiff ferryboat workers motion to strike the Government's first and second * affirmative defenses, and denied the Government's Motion for Summary Judgment. App. 2a, 18a-22a. In its Opinion and Order the Court noted, without deciding, three possible alternative (but not necessarily concurrent) bases for federal subject matter jurisdiction over the Complaint: 28 U.S.C. § 1331, 28 U.S.C. § 1346(a)(2), and the Economic Stabilization Act of 1970, Pub. L. No. 92-210, § 211, *as amended*, 12 U.S.C. § 1904 (Supp. 1976).

After the parties had completed discovery and the Court had held two pretrial conferences, a non-jury trial commenced before Judge Metzner on February 20, 1975. App. 3a, 30a. The trial lasted one day. After trial the parties entered into a Stipulation which supplemented the trial record with additional exhibits, and stated that all documents previously submitted to the Court were deemed to be in evidence without objection. App. 189a-202a.

On November 3, 1975, the Court below issued an Opinion ordering the entry of judgment dismissing the Complaint. In its Opinion the Court found that the Governors Island ferryboat workers had not shown that they were not paid the wage rates prevailing in the maritime industry prior to August 15, 1971, the date a wage freeze was imposed by Executive Order No. 11615, 36

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* The third affirmative defense was withdrawn by the Government.

Fed. Reg. 15727. The Court also found that the ferryboat workers had not demonstrated that the United States Civil Service Commission's 1972 and 1973 decisions refusing to exempt the ferryboat workers' wages from the 5.5 percent annual wage increase ceiling imposed by Executive Order No. 11639, 37 Fed. Reg. 521 were not supported by substantial evidence. App. 206a-208a.

Statement of Facts

a) Background of the dispute

The appellant ferryboat workers are federal civilian employees who are employed in four different capacities * as officers and crew members on the ferryboats operated between Manhattan and Governors Island in New York harbor. App. 203a. The federal agency with jurisdiction over these workers has changed from time to time as Governors Island changed hands and the federal executive branch was reorganized.

The Department of the Army transferred Governors Island (and the connecting ferry operation) to the United States Coast Guard ("Coast Guard") on July 1, 1966. App. 124a-125a. At that time the Coast Guard was a part of the Department of the Treasury. A reorganization of the Executive resulted in the creation of a new department, the Department of Transportation ("DOT"), into which the Coast Guard was placed on April 1, 1967. *Id;* Pub. L. No. 89-670, § 6(b)(1), *as amended*, 49 U.S.C. § 1655(b)(1) (Supp. 1976); Executive Order No. 11340,

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* The four types of positions filled by the Governors' Island ferryboat workers are master, engineers, oiler, and deck hand. *See* App. 140a, 202a, 244a, 256a-259a.

32 Fed. Reg. 5453. Since 1967 DOT has had jurisdiction over the Governors Island ferryboat workers, and has paid them their wages.

When the United States Army had jurisdiction over the Governors Island ferryboat workers the Army and Air Force Wage Policy Board established the wage scale for the ferryboat workers. App. 125a-126a. Its successor, the Department of the Treasury, also had a Wage Board with the authority to set the wage scale of the Governors Island ferryboat workers. App. 129a. DOT did not have a comparable board for making wage policy decisions, but rather had a Personnel Policy Division within the Office of Personnel which was responsible for matters relating to employee wages. App. 122a, 199a, 214a.

Prior to the transfer of Governors Island and its ferry operation to the Coast Guard, the Army Air Force Wage Board had set the wages of ferryboat employees to parallel those paid similar employees of the 69th Street Ferry. App. 125a. The last wage increase prior to the transfer date occurred in April, 1966, when the Army increased wages retroactive to 1965. The 69th Street Ferry was no longer operating, but the Army followed the terms of the contracts which 69th Street Ferry employees had negotiated. App. 126a.

b) Department of the Treasury jurisdiction: July 1, 1966-March 31, 1967

On March 31, 1966, in advance of the transfer of Governors Island to the Department of the Treasury, the Treasury Department Wage Board considerd the impact of the upcoming transfer on the Governors Island ferryboat workers. The Board issued a decision which, *inter alia*, established a Coast Guard Maritime Service Single

Rate Schedule * for ferryboat employees at Governors Island which was to be adjusted in the future:

> by the same cents per hour increases in basic rates for comparable officer and crewman classifications in the City of New York Staten Island Ferry schedule. Any changes in overtime and holiday rates shall be recommended to the Treasury Wage Board for prior approval. App. 248a.

In its decision the Treasury Wage Board limited its ruling to the state of facts which then existed in the maritime industry in the New York Harbor area:

> The current prevailing rates in the New York Harbor area are the City of New York Staten Island Ferry rates. However, Coast Guard is not recommending Staten Island rates because they are based on operating ferryboats which are larger in terms of tonnage and distance travelled than the Governors Island Ferry (and the comparable 69th Street Ferry) and therefore they are higher, following maritime industry practice, than current Army rates.
>
> * * * * *
>
> . . . . However, this [not adopting the prevailing holiday rates in the Staten Island Ferry con-

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* This basic rate schedule was the Army's current basic rates for ferryboat employees increased by the amount of the July 1, 1965 increases granted the Staten Island Ferry employees. App. 248a. However, between the date of this decision (March 31, 1966) and the date of the Treasury Department's takeover (June 1, 1966), the Army had increased the wage scale of the ferryboat employees, as provided in the 69th Street Ferry employees contract, retroactive to September 1, 1965. App. 126a. On July 1, 1966 the Treasury Wage Board issued an adjusted wage schedule reflecting ten (10) cents an hour (unlicensed personnel) and fifteen (15) cents an hour additional wage increases effective July 3, 1966. App. 131a, 191a.

tract] is justifiable for the same reasons that Coast Guard is not recommending adoption of the prevailing basic wage rates in the Staten Island Ferry contract. App. 247a-248a.

c) DOT jurisdiction prior to the wage freeze: April 1, 1967-August 15, 1971

The transfer of the Coast Guard from the Department of the Treasury to DOT had no effect on the wages paid the Governors Island ferryboat workers. They continued to receive the same wages paid previously. App. 144a-145a. In 1968 plaintiffs' union asked the Coast Guard to review its wage rates. App. 191a. At that time the Staten Island Ferry employees had negotiated, but not yet signed, the terms of new contracts which would be retroactive to July 1, 1967. Those proposed agreements, which were eventually executed, contained a unique package of wage and hour benefits. These agreements granted cents per hour increases in the hourly wage schedule, and abandoned the traditional forty (40) hour work week. App. 271a-288a; 314a-318a. The regular work week was reduced to thirty (30) hours, and the workers were guaranteed two (2) hours overtime per week. It was no longer practicable to implement the 1966 Treasury Wage Board decision by reference to the Staten Island contracts.

The testimony of the Governors' Island ferryboat workers' witnesses indicates that the Staten Island Ferry agreements hid the actual amount of the wage increases received by reducing the workweek. App. 77a-78a:

> The Court: Where do you get 1664?
>
> The Witness: That is 32 hours times 52 weeks give you 1664 hours. The true hourly rate would

> be $7.05 but when I negotiated this contract the City being what it is——
>
> The Court: You didn't do too badly.
>
> The Witness: No, I didn't. When you get a reduction in hours with the same salary plus an increase in salary the hourly rate should have stayed at the 40-hour rate so that every other City employee would not be screaming that how can you reduce them weekly with an increase in annual salary and an increase in hourly rate.
>
> When we get to the next contract you will see that there is an enormous jump when the true hourly rate was determined and it is almost triple. App. 110a.

This juggling of figures made the effective hourly rate increase much greater than the "cents per hour increases in basic rates" referred to in the 1966 Treasury Wage Board decision.

Using a Staten Island Ferry captain's salary under the proposed contracts as an example, the hourly rate schedule in the new contract was $5.29 hour (App. 276a), a $.20 per hour increase when compared to the previous hourly rate. Plaintiffs' witnesses conceded this (App. 60a-61a, 79a, 107a-108a), and also testified that the effective hourly rate of a Staten Island Ferry captain determined by dividing the annual salary, ($11,732.00) by the number of hours worked annually (1664), would be $7.03 per hour. App. 107a. By contrast, plaintiffs claim that a Governors' Island ferryboat master should have received $6.36 per hour rather than $5.29 per hour or $7.03 per hour. App. 256a. An interim DOT calculation based on a forty (40) hour work week (2080 annual hours) divided into a captain's annual salary ($11,732.00) translated a Staten Island ferry captain's compensation into $5.64 per hour. App. 202a. DOT's final decision was that a Governors Island ferry master should receive

a 24.9% hourly increase in two increments retroactive to August, 1968, making a master's hourly wage rate $6.36 per hour.* App. 133a. This decision was reached as a result of a wage survey, and did not represent "parity" with the Staten Island ferry employees. App. 138a, 197a. The Court below found that DOT conducted a wage survey, and that the plaintiffs failed to show that they were not paid the prevailing wage rate. App. 205a-206a.

After plaintiffs' request for a wage increase DOT approved the taking of a survey of wage rates paid personnel performing duties in the New York harbor area similar to those performed by the Governors Island ferryboat workers. App. 191a-192a. The Court below found that the ferryboat workers union representatives were fully advised that the survey was being conducted, and had ample opportunity to comment on the findings. App. 205a. On at least one occasion the Governors Island ferryboat workers were informed in writing of the existence of the survey, and of its purpose with respect to wage increases which the union had requested. App. 194a. *See* App. 191a.

The Governors Island ferryboat workers next requested a review of their wage rates in March, 1971. Their request sought a 53% increase in their hourly wages, which was 13% greater than the wage increases negotiated by the Staten Island Ferry employees. App. 64a, 242a. This request was prompted by the at least tentative informal agreement between the City of New

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* The hourly wage increases awarded the four Governors Island Ferry wage classifications ranged from 21% to 24.9%, and from $.82 per hour to $1.27 per hour. App. 132a-133a. On February 19, 1969 DOT paid the Governors Island ferryboat workers part of their wage increase retroactive to August 25, 1968. The balance of this increase was paid in December, 1969, retroactive to August 25, 1968. App. 59a.

York and Staten Island Ferry employees concerning wages and working conditions for the period July 1, 1970 through June 30, 1973. *Id.* It appears that neither the agreement governing licensed employees nor the agreement governing unlicensed employees was executed prior to August 16, 1971.*

On August 15, 1971, the President of the United States promulgated Executive Order No. 11615, 36 Fed. Reg. 15727, which temporarily froze any wage and price increases in the United States. In the five (5) month period between these claimed tentative agreements and August 15, DOT did not intiate a survey. However, preliminary preparations for a survey had begun. App. 347a.

d) United States Civil Service Commission Jurisdiction Under Executive Order No. 11639, and its aftermath

Everything that transpired between DOT and the Governors Island ferryboat workers with respect to wage increases between August 15, 1971 and April 30, 1974, was dictated by executive orders issued under the Economic Stabilization Act of 1970, Pub. L. 91-379, *as amended*, 12 U.S.C. § 1904 (Supp. 1976). Executive Order No. 11615, which established a ninety (90) day wage and price freeze, was superseded on October 15, 1971 by Executive Order No. 11627, 26 Fed. Reg. 20139, which

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* The Staten Island Ferry agreement effective July 1, 1970, governing licensed employees is dated August 4, 1972. App. 290a. The concurrent agreement between the City of New York and the Staten Island Ferry's unlicensed employees is dated sometime in December, 1971, and states therein that it memorializes an agreement in substance reached "prior to August, 1971." App. 319a. This agreement is not executed, and does not contain a specific date. Presumably it was signed sometime in December, 1971.

continued and extended the authority of the Cost of Living Council, created a Pay Board and Price Board, and, *inter alia*, established a wage increase ceiling of unspecified duration. On January 11, 1972, the President issued Executive Order No. 11639, 37 Fed. Reg. 521, which delegated to the United States Civil Service Commission (hereinafter the "Commission") the power to issue instructions governing the establishment of rates of basic pay for federal prevailing rate employees, which would include the Governor's Island ferryboat workers. The Commission was granted the authority to permit pay schedule adjustments which exceeded its guidelines only when three conditions were met:

> (i) a tandem relationship exists between a Federal pay schedule for a specialized employee unit and pay increases granted in a specialized activity in the private sector,
>
> (ii) the Pay Board has permitted a pay increase for the specialized activity in the private sector which is in excess of the guidelines, and
>
> (iii) it is determined that a comparable increase is essential to the continued operation of the Government service concerned. Executive Order No. 11639, *supra*.

It is undisputed that pursuant to Executive Order No. 11639 the Commission set a 5.5% maximum limit on annual wage increases paid federal prevailing rate employees, and that the Governors Island ferryboat workers received three such wage increases, the first effective February 29, 1972, the second effective July 8, 1973, and the third effective April 1, 1974. App. 133a-135a; 57a-58a. Before granting these increases, DOT took wage surveys of commercial marine transportation companies in the New York harbor area to determine whether wage rate increases were warranted. App. 139a, 221a, 234a, 238a.

The first such request was made in a letter to the Commission dated June 30, 1972. App. 233a. The letter asked for almost 4% more than the 5.5% increase already granted. The amount of the requested increase was based upon a 1972 survey of maritime industry pay rates in the New York harbor area. The letter conceded that all other maritime operations in New York harbor were significantly different from the Governors Island ferry operation, that turnover among Governors Island ferryboat workers was low, and that any resulting vacancies were easily filled. *Id.*

The Commission properly rejected this request for exemption from the guidelines because it did not meet any of the three conditions which had to be satisfied. App. 224a-230a. Pursuant to its authority under Executive Order No. 11639 the Commission had issued a "Background Paper for Exception to the 5.5 Percent Annual Wage Increase Limit" which set forth the Commission's interpretation of the executive order. App. 231a. That interpretation is not at issue here. The Commission applied the executive order as interpreted by the "Background Paper" to the facts, and found as follows. One, the periodic conduct of a survey of maritime industry rates did not constitute the requisite well established and consistently maintained relationship between two units of employees within a commonly recognized industry. Two, the Pay Board had not previously approved any increases of maritime industry wage rates in excess of the 5.5% guidelines. Three, the Governors Island ferry was not experiencing any employee recruitment or retention problems and, therefore, higher pay was not necessary to fulfill DOT's needs.

DOT again requested a similar exemption from the 5.5% ceiling in a letter dated July 27, 1973. App. 221a. The letter asked for an additional 4 + % average wage in-

crease, and cited in support of this request the approval of 10% average wage increases granted by the Pay Board to private sector maritime workers and by the Commission to the Department of Defense New York Harbor Boat Schedule. These were the only additional facts presented to the Commission which were not before it the previous year. The Commission agreed that this new information satisfied the Executive Order's second condition, but denied DOT's request because the Executive Order's first and third conditions had not been met for the same reasons stated in 1972. App. 214a-218a.*

Not only did the record before the Commission contain no support for an exemption to the 5.5% wage increase guideline, but the ferryboat workers themselves also did not introduce at trial in the Court below any evidence to contradict the findings of the Commission. What testimony there was on this point only corroborated the Commission's finding that DOT had no difficulty obtaining ferryboat workers under the 5.5% wage rate increases it was then paying. App. 103a-105a, 142a-143a. The District Court found:

> Plaintiffs have failed to show lack of substantial evidence to support the Commission's rulings. It may be that at times "a ferryboat is a ferryboat is a ferryboat," but not for the purposes of this action. In the first place, there was no tandem rela-

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* The wage and price controls maintained pursuant to the Economic Stabilization Act of 1970, *as amended*, expired on April 30, 1974. Pub. L. 93-28, 87 Stat. 27. The 1974 5.5 per cent maximum annual wage increase had been given the Governors Island ferryboat workers on April 1, 1974. In addition, effective May 12, 1974 the Governors' Island ferryboat workers received an average 6.5% hourly wage increase in order that their wage rates would be comparable to the prevailing rates then paid the maritime industry. App. 135a. This latter increase implemented the results of a wage survey conducted in 1974. App. 135a.

tionship in the pay schedule between the Staten Island ferry employees and plaintiffs. The scale was different. Only for a short period of time was the amount of increase the same. As pointed out above, the retroactive increases granted from 1968-1970 were based on prevailing rates in the harbor as a whole and not on an effort to equate the increases with Staten Island.

Secondly, it is perfectly clear from the record, and plaintiffs have failed to show otherwise, that a comparable increase was [not] necessary to the continued operation of the government service. In fact, the ferryboat wage schedule for nonsupervisory personnel is higher than the government's Coordinated Federal Wage System (CFWS) for similar personnel in the New York area. The plaintiffs here are excluded from CFWS. 5 U.S.C. § 5102(c)(8). Consequently, there is no difficulty obtaining employees in this area. In addition, some of the licensed personnel could not, under the limitations of their licenses, work on the Staten Island ferry. App. 208a-209a.

ARGUMENT

POINT I

Federal employees do not have a substantive right to back pay in a case arising under 5 U.S.C.A. § 5348(a) (Supp. 1976).

The Governors Island ferryboat workers seek back pay from July, 1967 to August, 1968, and from July, 1970 to the present.* App. 11a; Brief of Appellants at 27. The Government respectfully contends that this Court is barred by the doctrine of sovereign immunity from awarding back pay.

It is well settled that no action lies against the United States unless the legislature has authorized it. *Dalehite* v. *United States*, 346 U.S. 15, 30 (1953). Suits against the United States can be maintained only in the manner prescribed, and subject to the restrictions imposed by Congress. *Munro* v. *United States*, 303 U.S. 36, 41 (1937); *Reid* v. *United States*, 211 U.S. 529, 538 (1909). Any waiver of sovereign immunity and any limitation or condition imposed by the United States with respect to such a waiver should be strictly construed, and exceptions to the United States sovereign immunity should not be implied. *Soriano* v. *United States*, 352 U.S. 270, 276 (1957); *United States* v. *Sherwood*, 312 U.S. 584, 590 (1940).

The complaint in the case at bar names as defendants the Secretary of the Department of Transportation, a Commandant of the United States Coast Guard, and individual members of the United States Civil Service Commission. App. 4a. Although the United States is not a named defendant, the law is clear that an action naming Government officials as defendants is really a suit against the United States if the judgment sought would require the payment of public funds or would interfere with the public administration by either preventing the Government from acting or requiring it to act. *Hawaii* v. *Gordon*, 373 U.S. 57 (1963); *Dugan* v. *Rank*, 372 U.S. 609 (1963); *Land* v. *Dollar*, 330

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* In addition, plaintiffs demand that this Court order DOT to declare the Staten Island Ferry employees as the sole point of reference for plaintiffs' wages. It is clear that the manner in which DOT determines plaintiffs' future pay "from time to time . . . in accordance with prevailing rates and practices" involves the exercise of the discretion which Congress committed to the DOT by 5 U.S.C.A. § 5348 (Supp. 1976). The Government submits that this Court cannot preempt DOT's authority to determine the future wages of these plaintiffs.

U.S. 731 (1947); *Brown* v. *General Services Admin.*, 507 F.2d 1300, 1307 (2d Cir. 1974), *cert. granted*, 421 U.S. 987 (1975). The complaint here is, in reality, a suit against the United States and, therefore, the plaintiffs must establish that the United States has waived its sovereign immunity. We submit that the United States has not waived its sovereign immunity.

These principles of sovereign immunity were recently reiterated by the Supreme Court in *United States* v. *Testan*, — U.S. —, 44 U.S.L.W. 4245 (Mar. 2, 1976). In *Testan*, the Supreme Court held that a federal employee was not entitled to back pay due to the employees alleged misclassification. The Court's analysis was based on its interpretation of three statutes: the Tucker Act, 28 U.S.C. § 1491, *as amended;* the Classification Act, 5 U.S.C. § 5101 *et seq.;* and the Back Pay Act, 5 U.S.C. § 5596. The Supreme Court's analysis of these statutes is dispositive of the case at bar.

In *Testan*, the Court held that the Tucker Act was merely a jurisdictional statute which did not create any substantive right of back pay. In the case at bar, the jurisdictional statutes, although not alleged, are 28 U.S.C. § 1331 and 28 U.S.C. § 1346(a)(2).* These statutes are merely jurisdictional and create no substantive right of back pay. *See Duarte* v. *United States*, — F.2d — (2d Cir., Mar. 26, 1976) (No. 75-6102).

In *Testan*, the Supreme Court analyzed the statute involved and held that there was no express waiver of sovereign immunity. In the case at bar, the only possible source for a waiver of sovereign immunity is 5 U.S.C.A. § 5348(a) (Supp. 1976), which reads as follows:

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* The complaint does not specify the amount of damages sought. To the extent plaintiffs seek an award in excess of $10,000, jurisdiction would only lie in the Court of Claims.

> (a) Except as provided by subsections (b) and (c) of this section, the pay of officers and members of crews of vessels excepted from chapter 51 of this title by section 5102(c) (8) of this title shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry.

This statute cannot be fairly " 'interpreted as mandating compensation by the Federal Government for the damage sustained.' " *United States* v. *Testan, supra*, 44 U.S.L.W. at 4248.* The United States has not consented to be sued for the monetary relief sought here.**

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* Prior to te Supreme Court's decision in *Testan*, the Court of Claims had awarded back pay in certain situations on the basis of the "legal entitlement" test, *i.e.*, an admission of error on an agency's part automatically gives rise to a right to back pay. The *Testan* Court rejected this analysis. 44 U.S.L.W. at 4249. In one case involving 5 U.S.C.A. § 5348(a) the Court of Claims without any analysis of the issue of sovereign immunity, apparently did award back pay. *See Blaha* v. *United States*, 511 F.2d 1165 (Ct. Cl. 1975). Since section 5348 does not provide for an award of back pay, the *Blaha* Court apparently relied on the "legal entitlement" theory which was specifically rejected by the Supreme Court.

** It is to be noted that the plaintiffs, as "officers and members of crews of vessels. . . ." (5 U.S.C.A. § 5348 (Supp. 1976)), are not even entitled to retroactive pay as are other prevailing wage rate system employees. *See* 5 U.S.C.A. §§ 5342(a)(2), 5344 (Supp. 1976).

POINT II

The Department of Transportation's use of a wage survey method for fixing and adjusting the Governors Island ferryboat workers rates of pay did not violate, and need not comply with, the publication or rulemaking requirements of the administrative Procedure Act, 5 U.S.C. §§ 552, 553.

Plaintiffs argue that the 1966 Treasury Wage Board decision survived the birth of DOT, and that DOT was bound by the terms of this decision until it repealed or amended the decision in accordance with the requirements of the Administrative Procedure Act, 60 Stat. 236, *as amended*, 5 U.S.C. §§ 551 *et seq.* The decision was not repealed or amended pursuant to the Administrative Procedure Act. It is the Government's position that the Administrative Procedure Act is not applicable to the 1966 Treasury Wage Board decision. Moreover, had the decision been followed by DOT, plaintiffs would not have received as much pay as they actually did receive.

Assuming *arguendo* that the Treasury Wage Board decision retained its validity following DOT's creation.*

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* The "savings provision" in the DOT Act, Pub. L. 89-670, § 12, upon which plaintiffs rely, only applies to those orders or rules lawfully issued before the executive reorganization. 1966 U.S. Code Cong. & Admin. News 3395; 112 Cong. Rec. 20131 (1966). The procedural requirements that plaintiffs seek to impose on DOT regarding its method of determining wage rates *à lortiori* apply to the manner in which the Treasury Department promulgated its 1966 decision. That decision was issued several months prior to the time the Treasury Department first had jurisdiction over the Governors Island ferryboat workers. The record is devoid of any indication that the 1966 Treasury Wage Board decision conformed to the publication or rulemaking requirements

[Footnote continued on following page]

DOT's departure from the 1966 Treasury Wage Board decision did not have to comply with the requirements of 5 U.S.C. § 552 ("section 552") or 5 U.S.C. § 553 ("section 553"). The sections are not applicable to DOT for the following reasons:

1) the 1966 Treasury Wage Board decision, and the conduct of wage surveys by DOT, were not substantive rules of general applicability which must be published and are personnel management decisions exempt from the procedures established for rulemaking;

2) the Governors Island ferryboat workers had actual and timely notice of DOT's conduct of a wage survey to determine the prevailing rates in the maritime industry;

3) the method for setting the wages of the few dozen Governors Island ferryboat workers is related solely to the internal personnel rules and practices of DOT and, as such, need not be published.

A. The publication and rulemaking requirements of the Administrative Procedure Act are inapplicable

The Government concedes that the 1966 Treasury Wage Board decision was a "rule" as that term is de-

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of 5 U.S.C. §§ 552, 553. Therefore, it appears that the 1966 Treasury Wage Board decision does not come within the "savings provision" of the DOT Act.

fined in 5 U.S.C. § 551(4);* however, it is equally clear that the publication requirements of section 552 are not applicable to all "rules" and, as a matter of law, are not applicable to the case at bar. The appellants do not cite any relevant authority to the contrary.

Section 552 limits the Administrative Procedure Act's publication requirements to five specific categories of agency material. The classification which is most arguably applicable to DOT in the case at bar is subsection D, which provides:

> Each agency shall separately state and currently publish in the Federal register for the guidance of the public—
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> * * * * *
>
> (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency . . . .

First of all, it is clear that DOT's "rule" with respect to determining the prevailing rates and practices for the plaintiffs is not a rule of "general applicability". DOT's practices in this regard, as well as the practices of the Treasury Department as reflected in its 1966 decision, were specifically limited to the work situation and employees at Governors Island.

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* In part, a "rule" is defined as an "agency statement of . . . *particular applicability* and future effect designed to . . . prescribe . . . policy [relating to] . . . the . . . prescription for the future of . . . wages . . . 5 U.S.C. § 551(4) (emphasis added). The 1966 Treasury Wage Board decision, limited in its effect to the small cadre of plaintiffs, is an agency statement of particular applicability.

Secondly, "substantive rules of general applicability adopted as authorized by law"—is considered to mean those rules adopted pursuant to the rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. § 553. *See* K. Davis, *Administrative Law Treatise*, § 3A.7 at 125 (Supp. 1970).

Section 553(b) requires that a "[g]eneral notice of proposed rulemaking . . . be published in the Federal Register. . . ." This requirement, however, is inapplicable to a "rule" that involves " . . . a matter relating to agency management or personnel or to . . . grants, benefits, or contracts." 5 U.S.C. § 553(a)(2).

This exemption has been construed to include such matters as Federal Housing Authority approved rent increases affecting tenants in a housing project (*Langerin* v. *Chenango Court, Inc.*, 447 F.2d 296, 300 (2d Cir. 1971)) and insurance eligibility. *Rainbow Valley Citrus Corp.* v. *Federal Crop Insurance Corp.*, 506 F.2d 467, 468-69 (9th Cir. 1974). Similarly, the wage increases granted the ferryboat workers, and the mechanics of determining the amount of these increases, in matters relating to grants and benefits is beyond the scope of Section 553.*

Section 553(a)(2) exempts DOT's methodology of determining the prevailing rates and practices in the maritime industry from the rulemaking requirements of the

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* The Administrative Procedure Act's exemption of agency personnel matters from the rulemaking provisions of the Act is in accord with the well established rule limiting judicial review in federal personnel cases to a determination as to whether the agency has acted arbitrarily. *See, e.g., United States* v. *Professional Air Traffic Controllers Organization (PATCO)*, 438 F.2d 79 (2d Cir. 1970), *cert. denied*, 402 U.S. 915 (1971); *Kavazanjian* v. *United States Immigration and Naturalization Service*, 399 F. Supp. 339 (S.D.N.Y. 1975), *aff'd mem. on the Opinion of the District Court*, — F.2d — (2d Cir. Apr. 21, 1976).

Administrative Procedure Act. Since section 552(a)(1)(D) only requires publication of substantive rules of general applicability promulgated in accordance with section 553, DOT's methodology of determining prevailing rates and practices need not be published in the Federal Register. It necessarily follows that DOT need not follow the publication and/or rulemaking requirements of the Adminstrative Procedure Act when it determines to change an existing method for determining prevailing rates and practices. *See* 5 U.S.C. § 552(a)(1)(E).

A contrary conclusion would exalt a "rule" promulgated under the prevailing wage rates statute, 5 U.S.C.A. § 5348(a) (Supp. 1976) to a stature greater than its source. Section 5348(a) charges DOT with the responsibility of fixing and adjusting from "time to time . . ." the plaintiffs' pay in accordance with "prevailing rates and practices in the maritime industry." To the extent that the Administrative Procedure Act would invalidate a wage adjustment because the DOT is deemed bound by a 1966 decision which no longer reflects prevailing rates and practices in the maritime industry, there is a conflict between this application of the Administrative Procedure Act and 5 U.S.C.A. § 5348(a) (Supp. 1976). The latter, which is the express source of DOT's authority in this matter, must prevail. *Kilgore National Bank* v. *Federal Petroleum Board*, 209 F.2d 557, 561 (5th Cir. 1954).

B. The plaintiffs had actual notice that DOT was not going to follow the 1966 Treasury Wage Board decision.

Section 552(a)(1) does not permit one to rely on the absence of required publication if that person has actual and timely knowledge of the unpublished matter. *Kessler* v. *F.C.C.*, 326 F.2d 673, 690 (D.C. Cir. 1963); *United States* v. *Aarons*, 310 F.2d 341, 348 (2d Cir.

1962) (Friendly, *J.*); *Airline Pilots Association* v. *C.A.B.*, 215 F.2d 122, 124 (2d Cir. 1954). The Governors Island ferryboat workers knew in 1968, prior to the determination of any wage increase, that DOT was conducting a survey of the New York harbor maritime transportation industry for the purposes of establishing what the prevailing wage rates were.

The District Court in its opinion found that "union representatives of the plaintiffs were fully advised as the study went forward and were afforded the opportunity to comment on the finding." App. 205a. This finding is fully supported by the record. The ferryboat workers were informed in writing on at least one occasion prior to the completion of the survey that progress was being made, and that the survey results were a prerequisite to any wage increase decision. App. 194a. The ferryboat workers' principal witness admitted that the union had been given the opportunity to participate in the 1968 survey. App. 70a. The plaintiffs had actual notice that DOT was not going to follow the 1966 Treasury Wage Board decision and, consequently, cannot complain that DOT's decision was not published in the Federal Register.

C. The methodology of determining the prevailing wage rate of these employees is related solely to the internal rules and practice of DOT and need not be published

The appellants' sole focus in support of their claim that the publication requirements of 5 U.S.C. § 552(a)(1) are applicable here is an analysis of why publication is not exempt pursuant to section 552(b)(2) which provides:

> This section does not apply to matters that are—
>
> * * * * *
>
> (2) related solely to the internal personnel rules and practices of an agency . . . .

This argument ignores the provisions of 5 U.S.C. §§ 552 (a)(1)(D) which clearly exempt DOT from the publication requirements in this instance. In addition, it is clear that 5 U.S.C. § 552(b)(2) also exempts DOT from the publication requirements.

Section 552(b)(2) must be construed in light of two other provisions of the section: the publication provision, 5 U.S.C. § 552(a)(1), and the disclosure or availability of information provision, 5 U.S.C. § 552(a)(2), *as amended*. All of the cases relied upon by appellants arise under the disclosure or availability of information provision, 5 U.S.C. § 552(a)(2), and not under the publication provision, 5 U.S.C. § 552(a)(1). The issue of availability of information for public inspection is not at issue here. Likewise, the public policy considerations mandating Government disclosure of information pursuant to 5 U.S.C. § 552(a)(2) requests are irrelevant to the case at bar.

The appellees submit that the appropriate benchmark for determining whether the procedures used by the agencies are exempt from publication *solely* on the basis of the exemption in section 552(b)(2) is this Court's determination of the effect of non-publication on the general public. Where "[t]he public effect [of an agency rule] is remote", section 552(b)(2) exempts the agency from the publication requirements of section 552(a)(1). *Cafeteria & Restaurant Workers Union, Local 473* v. *McElroy*, 284 F.2d 173, 179 (D.C. Cir.), *aff'd on other grounds*, 367 U.S. 886 (1960).* *See Department of the Air Force* v. *Rose*, — U.S. —, 44 U.S.L.W. 4503 (Apr. 21, 1976) (a section 552(a)(2) case).

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* This analysis is buttressed by the provisions of 5 U.S.C. 552(a)(1)(D) which, *inter alia*, require that a rule be of general applicability before it need be published.

We submit that the public effect here is remote. DOT's method of determining the plaintiffs' wages is limited in application to the Governors Island ferryboat workers. As set forth above, the plaintiffs are fully aware of the survey methods which were used; indeed, they were invited to participate in the 1968 survey. App. 70a. Moreover, the record reflects that the plaintiffs' union did participate in wage surveys. App. 139a-140a. Publication would merely set forth a practice with which plaintiffs are totally familiar. Given the remote effect that the decisions at issue here have on the general public and the plaintiffs actual knowledge of how these decisions are reached, it would be doing the public a disservice to require the expense of publication in the Federal Register and to add this minutiae to the ever-burgeoning Federal Register.

D. Plaintiffs received more money in wages during the period July 1, 1967-June 30, 1970 than they would have received under the 1966 Treasury Wage Board decision

In 1969, DOT awarded the Governors Island ferryboat workers hourly wage increases ranging from 21% to 25% of their previous pay, retroactive to August 25, 1968. App. 132a-133a. This adjustment was based upon wage information obtained in a survey taken of wages paid in a representative segment of the marine transportation industry in New York harbor. App. 164a, 191a-202a, 205a. Nevertheless, the increases granted did not result in the Governors Island ferryboat employees receiving a lower cumulative wage than they would have received if the 1966 Treasury Wage Board decision had been applied.

The Treasury Wage Board decision established a Coast Guard Maritime Service Single Rate Schedule which was to be adjusted in the future "by the same cents per hour increases in basic rates for comparable officer and crew-

men classifications in the City of New York Staten Island Ferry schedule." The only cents per hour basic rate schedules set forth in the Staten Island Ferry 1967-1970 contracts are at App. 276a, 315a. These rates apply to eight different job classifications, as compared to the Governors Island Ferry's four job classifications.

The comparative effects of the wages awarded the Governors' Island ferryboat workers and the Staten Island Ferry's basic hourly rate schedule can best be illustrated by examining the rates of one set of comparable job classifications. A Staten Island captain's basic hourly rate during the entire period July 1, 1967-June 30, 1970 was $5.29 an hour. App. 276a. A Governors' Island master received $5.09 an hour from July 1, 1967-August 24, 1968, and $6.36 an hour from August 25, 1968-June 30, 1970. App. 60a-61a. The substantially greater wage paid the Governors Island Ferry master during the last 22 months of the 36 month wage period more than offsets the slightly lower hourly rate which he received during the wage period's first 14 months.

Those appellants who testified at trial recognized that the 1967-1970 Staten Island Ferry contracts did not provide much of an increase in the basic hourly rate because, for labor relations reasons, it was desirable that the other City of New York employees not see the full impact of the benefits negotiated by the Staten Island Ferry employees. App. 110a.* These considerations, however, are

* Appellants tried this case in the Court below on the theory that there was legally enforceable parity between the wages set for the Governors Island ferryboat workers and the terms of the Staten Island ferryboat workers' contracts. Under this theory DOT would have to reflect in the hourly rates paid during this three year period the increased hourly benefits received by the Staten Island ferry employees through contracts which included a thirty hour work week and two hours of mandatory overtime per

[Footnote continued on following page]

irrelevant to the 1966 Treasury Wage Board decision, which contemplated a simple transfer of cents per hour wage increases from the basic hourly rate schedule set forth in the Staten Island Ferry contracts. If DOT had passed on those increases in accordance with the terms of the 1966 Treasury Wage Board decision, then the Governors Island ferryboat workers would have received less money per hour than they actually were awarded by DOT during the three year period. Thus, plaintiffs were not adversely affected by DOT's failure to follow the 1966 Treasury Wage Board decision.

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week. This could arguably be accomplished in three ways which, again, may be illustrated by using the captain's wage rate:

1) Divide the Staten Island ferry captain's annual salary ($11,732) by the number of hours worked annually by his Governors Island ferry counterpart (2080 hours), yielding a wage rate of $5.64 per hour. App. 202a. If this wage rate were paid the Governors Island ferryboat workers commencing July 1, 1967, the total amount received through June, 1970, would be less than these workers were actually paid by DOT.

2) Divide the Staten Island ferry captain's annual salary ($11,732) by the number of hours worked annually by the captain to earn his salary (1664), yielding a wage rate of $7.05 per hour. App. 110a.

3) Translate the Staten Island ferry contracts 25% reduction in the length of the work week into a 25% wage increase, and ignore the hourly wage increases, yielding a wage rate of $6.36 per hour. App. 109a-110a, 264a.

Plaintiffs' claim is based on the third alternative. These calculations, however they may be designed by third persons to devise an effective hourly rate derived from the contract in its entirety, are irrelevant to the application of the 1966 Treasury Wage Board decision to the sole basic hourly rate schedule set forth in these 1967-1970 agreements. Moreover, even though plaintiffs consider the $6.36 per hour which masters received from August, 1968 to June, 1970 to be parity (App. 54a-56a), normal mathematical calculations using the hour and wage terms of the Staten Island Ferry contracts do not produce this result.

POINT III

Plaintiffs have not demonstrated that the Department of Transportation was so arbitrary as to be clearly wrong in fixing and adjusting their rates of pay.

The plaintiffs claim that there was no valid reason for changing the use of the Staten Island Ferry wage schedule as the standard for setting Governors Island Ferry employee rates. It is their contention that DOT's adoption of a survey method was illogical and arbitrary because it did not satisfy the provision of 5 U.S.C.A. § 5348(a) (Supp. 1976) as well as the 1966 Treasury Board decision. Plaintiff's argument proceeds from an incorrect factual premise and ignores the proper standard for judicial review of wage rates set by an agency pursuant to 5 U.S.C.A. § 5348(a).

The Governors Island ferryboat workers incorrectly assume that the Department of the Treasury had adopted the Staten Island Ferry wage schedule as a standard for their pay, or had determined that the Staten Island Ferry wage rates reflected the prevailing rates for the maritime industry. Brief of Appellants at 6-7, 17-18. Neither assumption is correct. The 1966 Treasury Wage Board decision clearly recognized that the Staten Island Ferry rates were higher, following maritime industry practice, because they were based on operating ferryboats which travelled a substantially greater distance, and were larger, than the Governors Island ferryboats. App. 247a. These differences in size and operation of ferryboats are supported by the testimony of the Governors Island ferryboat workers. App. 42a-45a, 74a-75a. The Treasury Wage Board decision noted these differences and restricted itself to adopting "the same cents per hour

increases in basic rates for comparable officer and crewman classifications in the City of New York Staten Island Ferry schedules." App. 248a.

DOT is not restricted by any statute or regulation in the means which it may use to determine prevailing rates and practices in the maritime industry. Section 5348(a) only governs the end result, *i.e.*, that pay "be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry."

Under 5 U.S.C.A. § 5348(a) (Supp. 1976) DOT is accorded discretion in fixing and adjusting pay, including "the selection of the segment of the maritime industry to be treated as the model for comparison." *Blaha* v. *United States*, *supra*, at 1167. The scope of judicial review is limited to determining "whether plaintiffs have met their heavy burden of proving that the Secretary's action in this instance was so arbitrary as to be clearly wrong." *Daniels* v. *United States*, 407 F.2d 1345, 1347 (Ct. Cl. 1969), *citing United States* v. *Shriver*, 367 U.S. 374, 381-82 (1961).

In *Daniels*, *supra*, the court upheld ship pilots' wages set by the Secretary of the Navy pursuant to a nationwide formula which used 70% of the base pay for a forty (40) hour week of a Class A Ship's Master in the Military Sea Transportation Service. 407 F.2d at 1346. The pilots had contended that their pay should be equivalent to the pay received by pilots who were performing similar duties in their local area. *Id.* The court upheld the Navy's exercise of its statutory discretion to establish a uniform national salary rate because it was the Secretary's administrative responsibility to determine "how closely the salaries of the specified personnel can parallel the maritime industry's rates and still be 'consistent with the public interest.'" 407 F.2d at 1347. *See*

also Beneventa v. *United States*, 461 F.2d 1316 (Ct. Cl.), *cert. denied*, 409 U.S. 1038 (1972).

Similarly, in the case at bar the Governor's Island ferryboat workers attack as arbitrary DOT's selection of a number of commercial marine transportation activities as the basis for determining the prevailing rates in the maritime industry. No evidence was introduced at trial which cast any doubt on the accuracy of the results obtained from this sample. Rather, plaintiffs merely claim that the Staten Island Ferry employees were paid the prevailing maritime rate for ferryboat workers, which rates was greater than the wages paid the Governors Island ferryboat workers. So long as DOT used maritime wage rates for any comparable positions,* plaintiffs' argument must fail:

> Plaintiff's entire theory of recovery is predicated upon the situation that existed in the Mayport-Jacksonville vicinity. They have not attacked as arbitrary the Navy's *choice* of a national uniform salary scale, except indirectly through showing that the application of the rates in the particular area resulted in unequal treatment. Nor have plaintiffs offered or attempted to show that the use of the scale caused a *universally* wide difference between the salaries prevailing in the maritime industry and those paid by the Government. A showing of a regional salary difference without more is insufficient to prove that the Secretary's choice and use of the nationally applied salary rate was arbitrary and inconsistent with his statutory duty. 407 F.2d at 1348.

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* Plaintiffs' argument that for reasons of administrative convenience DOT chose periodic surveys of several marine transportation companies, in lieu of transferring wage increases from the Staten Island Ferry contracts, is specious.

The Governors Island ferryboat workers also object to the absence of a wage increase during the periods July 1, 1967—August 24, 1968, and July 1, 1970—August 15, 1971. Section 5348(a), however, only provides for the adjustment of wages "from time to time". Whether an increase is warranted, or how frequently wage rates should be reviewed, is within the agency's discretion.

The record reveals that DOT took action whenever a wage review was requested by the Governors Island ferryboat workers. These requests came in 1968 (App. 191a) and in March of 1971 (App. 64a, 242a). In 1968 DOT initiated a wage survey, and granted wage increases in 1969 which were retroactive to August 25, 1968. There was no unreasonable delay in the granting of these retroactive increases.

In 1971, DOT was precluded from granting wage increases in excess of the 5.5% wage freeze imposed by Executive Order No. 11639. In the five month period between the request for a wage increase and the implementation of the wage freeze, DOT made preliminary preparations for a wage survey; however, no survey was initiated prior to August 15, 1971, the date the wage freeze went into effect. After August 15, 1971, the plaintiffs were granted the maximum wage increases authorized by Executive Order No. 11639. DOT could do no more. The agency has not acted unreasonably.*

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* The appellants' contention that DOT's failure to initiate and complete a wage survey prior to August 15, 1971 deprived them of increases accorded the Staten Island ferrymen is without merit. *See* Appellants' Brief at 20. The increases received by the Staten Island employees were determined by contracts executed no earlier than August 15, 1971. Moreover, the Staten Island and Governors Island employees were not in a "parity" relationship. App. 290a, 319a.

The plaintiffs have failed to demonstrate that DOT exceeded its authority or was plainly wrong in setting and adjusting their pay. The method used by DOT to determine comparable rates of pay in the New York Harbor area was a reasonable and rational method of determining the prevailing rates and practices in the maritime industry. The District Court, after evaluating the testimony and documents before it, properly found that the Governors Island ferryboat workers made no showing that they were not being paid the prevailing rate. App. 206a. We respectfully submit that the District Court should be affirmed.

POINT IV

This court lacks jurisdiction over an appeal from a judgment that there was substantial evidence to support the Civil Service Commission's denial of the Department of Transportation's request for an exemption from the wage increase guidelines.

The plaintiffs complaint presents two distinct claims. The first is that DOT did not fix and adjust their wages as required by 5 U.S.C.A. § 5348(a). The second is that the Commission's decisions in 1972 and 1973 denying DOT an exemption from the 5.5% annual wage increase ceiling were arbitrary and capricious. App. 4a-11a.

The second claim seeks judicial review of the Commission's exercise of the discretion in adjudicating wage ceiling increase exemptions granted it under Executive Order No. 11639, 37 Fed. Reg. 521. This executive order was issued pursuant the authority of the President under the Economic Stabilization Act of 1970, Pub. L. 91-379, § 203, 84 Stat. 799, *as amended*, 12 U.S.C.A. § 1904 (Supp. 1976).

Section 211(b)(2) of the Economic Stabilization Act of 1970, *as amended*, 12 U.S.C.A. § 1904 (Supp. 1976), provides:

> (2) Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder. Such appeals shall be taken by the filing of a notice of appeal with the Temporary Emergency Court of Appeals within thirty days of the entry of judgment by the district court.

Under this section only the Temporary Emergency Court of Appeals has jurisdiction over appeals from United States District Courts in cases or controversies arising under the Economic Stabilization Act of 1970, *as amended*, or regulations or orders issued pursuant thereto. It is obvious that a dispute over the Commission's application of Executive Order No. 11639 to DOT's 1972 and 1973 wage increase guideline exemption requests is a case or controversy arising under a regulation issued pursuant to the Economic Stabilization Act of 1970, *as amended*.

Since the Commission's action arises under Executive Order No. 11639, this Court lacks jurisdiction of that part of this appeal which seeks a review of the District Court's Judgment relating to the 1972 and 1973 Commission decisions.*

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* The plaintiffs' distinct and separate claim under 5 U.S.C.A. § 5348(a) (Supp. 1976) does not give this Court jurisdiction to determine that portion of the appeal which pertains to the Commission's action under Executive Order No. 11639. *Municipal Electric Utilities Ass'n* v. *FPC*, 485 F.2d 967, 970 (D.C. Cir. 1973). This Court should decline jurisdiction over this appeal to the extent it seeks appellate review of the District Court's determination with respect to the 1972 and 1973 Commission decisions made pursuant to Executive Order No. 11639. *Cf. M. Spiegel & Sons Oil Corp.* v. *B.P. Oil Corp.*, — F.2d —, No. 74-2079 (2d Cir. March 9, 1976) (*per curiam*).

POINT V

Assuming *arguendo* that this court has jurisdiction, the 1972 and 1973 decisions of the Commission denying DOT's requests for exemption from 5.5% wage increase guidelines are supported by substantial evidence.

The standard that is applicable to a judicial review of Commission decisions made pursuant to the Economic Stabilization Act of 1970, *as amended*, is set forth in § 211(d)(1) of the Act, 12 U.S.C.A. § 1904 (Supp. 1976), which states in part that no order of any agency exercising authority such as the Commission's

> shall be enjoined or set aside, in whole or in part, unless a final judgment determines that such order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence.

On reviewing an agency's order under this standard the court must give great deference to the agency's factual determinations and to its interpretation of the standards it is authorized to apply. *Amalgamated Meat Cutters* v. *Cost of Living Council*, 497 F.2d 1360, 1366 (Em. Ct. App. 1974) (and cases cited therein); *Carpenters 46 County Conference Board* v. *Construction Industries Stabilization Committee*, 393 F. Supp. 480, 498-99 (N.D. Cal. 1975). A decision is supported by substantial evidence if the reviewing court cannot say the agency acted in an arbitrary or capricious manner *Pacific Coast Meat Jobbers Association* v. *Cost of Living Council*, 481 F.2d 1388, 1391 (Em. Ct. App. 1973).

The 1972 and 1973 Commission decisions are supported by substantial evidence. Under Executive Order No. 11639 the Commission only had the authority to

exempt from its 5.5% annual wage increase ceiling those wage increases which would satisfy each of three conditions set forth in the executive order:

> (i) a tandem relationship exists between a Federal pay schedule for a specialized employee unit and pay increases granted in a specialized activity in the private sector,
>
> (ii) the Pay Board has permitted a pay increase for the specialized activity in the private sector which is in excess of the guidelines, and
>
> (iii) it is determined that a comparable increase is essential to the continued operation of the Government service concerned.

Although DOT requested on two occasions that the plaintiffs' wage increases be exempted from the 5.5% ceiling, neither request satisfied the conjunctive conditions of the Executive Order. The first request, dated June 30, 1972, did not satisfy any of these conditions. The second request, dated July 27, 1973, met one of the three conditions.

The first condition, the existence of a tandem relationship, was defined by the Commission as follows:

> The tandem relationship under the first provision is defined by the Pay Board as a well established and consistently maintained policy of following the pay practices in effect for a closely related group of employees. The employees to which related may be another unit of employees of the same employer. They also may be related to the practices of other employers when they are within the same commonly recognized industry (such as a two-digit Standard Industrial Classification category). The practices involved must be identical as to the timing and the amount and nature of general increases in wages, salaries and other compensation

> for a particular unit of employees. The tandem relationship must be so clear that it virtually guarantees that a general increase, in the normal operation of the practice, would have been put into effect and have been applicable to work performed were it not for the existence of controls affecting Federal pay. App. 219a.

DOT determined the prevailing rate to be paid its Governors Island ferryboat workers through a weighted average of rates paid comparable positions in commercial marine transportation operations in the New York harbor area. App. 217a, 228a. This practice had not been in existence prior to 1968.* Thus, DOT's method of granting wage increases to its Governors Island ferryboat workers was neither long established, nor tied to any other unit of employees in timing or amount. App. 214a-218a; 227a-235a. The third condition required that a wage increase be essential to the continued operation of the Government service concerned. DOT had no difficulty in recruiting and retaining workers. App. 215a, 233a-234a, 103a-105a, 142a-143a. Therefore, this condition was not satisfied.

The second condition, which required prior Pay Board approval for a pay increase for the activity in the private sector in excess of the guidelines, was admittedly satisfied in 1973, although not in 1972. App. 228a; 217a. While DOT's 1972 request did state that other maritime activities were receiving higher pay, it conceded that most of these employees were being paid under agreements in effect prior to August 15, 1971. App. 235a. No evidence was presented to the Commission or at trial which indi-

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* Plaintiffs take the position that the practice prior to their March, 1971 wage increase request was parity with Staten Island Ferry employees, and not the use of survey results. The Court below did not so find (App. 205a), and the record supports the Court's finding. App. 164a.

cated that the Pay Board had approved any of these wage increases.*

The Court below found that the ferryboat workers had failed to show a lack of substantial evidence to support the Commission's decisions. App. 208a. This conclusion is amply supported by the Commission's administrative record in itself and as amplified by the trial testimony.

CONCLUSION

For the foregoing reasons, the Judgment of the District Court should be affirmed.

Dated: New York, New York
April 30, 1976

Respectfully submitted,

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Of Counsel.

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* Appellants' reliance on *Blaha* v. *United States*, *supra*, is completely misplaced. *Blaha* is a 5 U.S.C.A. § 5348(a) case in which the court had to review differing determinations of the prevailing rates and practices in the maritime industry. There was a conflict between two agencies with respect to the prevailing rate for similar employees, and the court gave greater weight to the Navy Department's conclusion because its maritime experience was deemed to be greater than that of the Commerce Department. *Id.* at 1169, 1170. This decision, and the fact an exemption request originated with DOT, have no bearing on judicial review of the Commission's determination that DOT's requests did not satisfy the three conditions set forth in Executive Order No. 11639.

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Form 280 A-Affidavit of Service by Mail
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AFFIDAVIT OF MAILING

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State of New York)
County of New York) ss

Pauline P. Troia, being duly sworn, deposes and says that s he is employed in the Office of the United States Attorney for the Southern District of New York.

That on the

3rd day of May, 19 76 s he served 2 copys of the within govt's brief

by placing the same in a properly postpaid franked envelope addressed:

1) Marilyn Walter, Esq., Robert Roberts, Esq., 423 West 118th St. NY NY 10027
2) Dennis Yeager, Esq. Tufo, Johnston & Allegero Esqs., 645 Madison Ave. NY NY 10022
3) Richard Brook, Esq., Delson & Gordon, Esqs., 230 Park Ave. NY NY 10017
4) Thomas, Shaw Jr. Esq., Breed, Abbott & Morgan, Esqs., 1 Chase Manhattan Plaza, NY NY 10005

And deponent further says s he sealed the said envelope s and placed the same in the mail ~~chute~~ drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this

3rd day of May, 19 76

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977